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No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. LINDA A. LUJAN,

Petitioners,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel LINDA A. LUJAN, Relator, v. HUGHES AIRCRAFT COMPANY, Defendant.	No. CV-92-1282 SVW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Hughes Aircraft Company ("Hughes") is presently moving to dismiss Linda Lujan's ("Lujan") qui tam action, arguing that it is barred by section 3730(b)(5) of the False Claims Act ("FCA") which prohibits any person other than the government from bringing a related action based on the facts underlying a qui tam action that has been previously filed. *See* 31 U.S.C. § 3730(b)(5). Hughes contends that Lujan's action is related to a previously filed qui tam action brought by William Schumer in 1989 ("Schumer action"). Representative of the importance of Schumer's action to the present motion, the history of the Schumer Case is provided below.

A. The Schumer Action

Schumer's action alleged that Hughes had mischarged costs on the radar systems of four different aircraft programs – the B-2, F-15, F-14 and F-18 – during its participation as a defense contractor between 1982 and 1990. Schumer alleged that Hughes used cost sharing agreements called "commonality agreements" to shifts costs from "fixed-priced" contracts to "cost reimbursement" contracts. The government conducted an audit of this practice in 1986 and 1988 and concluded that Hughes had overcharged the government. However, in 1989-90, the government reversed its earlier findings and determined that Hughes' commonality agreements were proper and actually saved the government money.

On May 20, 1992, Judge Pfaelzer granted summary judgment in favor of Hughes, finding that "Schumer has not shown that Hughes violated the False Claims Act." On appeal, the Ninth Circuit affirmed most of Judge Pfaelzer's findings, remanding only on two narrow issues concerning Hughes conduct prior to 1986: (1) whether Hughes failed to timely disclose the 1982 commonality agreement to Northrop, and (2) whether Hughes failed to reflect the commonality charging practice in its accounting disclosure statement to the Government between December 1982 and January 1984. *See United States ex rel Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1523-23 (9th Cir. 1995).

When Schumer appealed the grant of summary judgment to the Ninth Circuit, Hughes cross-appealed on another issue. Hughes had argued unsuccessfully in the district court that because government auditors had

alleged the same mischarging prior to Schumer filing his action, the action was barred under the "government knowledge" defense. 31 U.S.C. § 3730(b)(4) (1982). This defense was eliminated by the 1986 amendments to the FCA. However, Hughes argued that the amendments should not be applied retroactively to Hughes' pre-1986 conduct. The Ninth Circuit disagreed with Hughes and held that the 1986 Amendment which eliminated the government knowledge defense applied retroactively to Hughes' pre-1986 conduct because it did not affect a "substantive right." *United States ex rel Schumer,* 63 F.3d at 1516-17.

Hughes appealed to the Supreme Court, and certiorari was granted with respect to: (1) whether the 1986 Amendments applied to pre-1986 conduct, (2) whether any of Schumer's claims were jurisdictionally barred by the Public Disclosure provisions of the FCA, and (3) whether the two issues that the Ninth Circuit had remanded – concerning the alleged disclosure infractions from 1982-84 – could possibly give rise to a FCA violation in view of the government's determination that there was no financial harm to the government.

The Supreme Court held that the 1986 amendments did not apply retroactively and thus, Schumer's pre-1986 claims were barred by the government knowledge defense which was present in the 1982 version of the FCA. Because the only claims remaining after the Ninth Circuit's ruling were pre-1986 claims, the entire case had to be dismissed. Therefore, the Supreme Court declined to reach the remaining issues presented for review.

B. Lujan's Action

Lujan filed this *qui tam* action against her previous employer, Hughes, in 1992. Lake Schumer, she alleged that Hughes submitted false claims to the government during its participation as a defense contractor in the B2 bomber and other projects between 1982 and 1989.

Apparently, soon after filing the action, Lujan's previous counsel brought the case to the attention of the media, in violation of the 60 day sealing provision in the statute. Hughes brought a motion to dismiss the action based on this violation. Judge Ideman, who previously had this case, granted dismissal on that basis.

The Ninth Circuit reversed Judge Ideman's decision, directing the district court to evaluate whether a lesser sanction may have been appropriate and providing some guidelines for this inquiry. In addition, the Ninth Circuit noted that this action appeared to be quite similar to the Schumer action and, sua sponte, directed the district court to consider whether Lujan's case was jurisdictionally barred based on § 3730(e)(4) of the False Claims Act.

Section 3730(e)(4) is a jurisdictional provision that bars qui tam actions which are "substantially similar" to allegations that were previously disclosed to the public. The Ninth Circuit directed the district court to consider whether the Schumer action resulted in public disclosure of the allegations in Lujan's action and therefore barred the Lujan action.

The district court directed the parties to brief the "public disclosure" issue and eventually dismissed

Lujan's action for lack of subject matter jurisdiction based on § 3730(e)(4). On appeal, the Ninth circuit reversed the district court's decision, finding that while the Schumer action was substantially similar to the Lujan action and thus, the Schumer action constituted public disclosure of Lujan's allegations, Lujan's action was not barred because Lujan fell within the exception to the public disclosure rule because she was an "original source" of the allegations. The Ninth Circuit also determined that Lujan could only maintain allegations arising from false claims submitted by Hughes after 1986. This ruling was based on the Supreme Court's decision in *Schumer* which held that the 1986 amendments to the FCA did not apply retroactively and thus, false claims which arose prior to 1986 were subject to the 1982 jurisdictional provisions which barred claims based upon information of which the government was already aware.

At this point Lujan's case has been remanded once again from the Ninth Circuit. Lujan's allegations have been limited by the Ninth Circuit to allegedly-false claims submitted by Hughes between 1986 and 1989. Defendant Hughes now brings another motion to dismiss based on lack of subject matter jurisdiction under § 3730(b)(5) of the FCA, res judicata and collateral estoppel.

II. Lujan's Action Is Barred By Section 1730(b)(5)

A. Section 37320(b)(5)

Section 3730(b)(5) states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action

based on the facts underlying the pending action." (emphasis added)

B. The Ninth Circuit Did Not Implicitly Reject Hughes' Section 3730(b)(5) Defense

Lujan argues that Hughes already presented this jurisdictional defense to the district court and the Ninth Circuit and lost. Therefore, Lujan contends, Hughes is barred from rearguing the issue now. Lujan's contentions are based on the fact that Hughes argued this issue to the district court and the Ninth Circuit. However, a look at the interesting manner in which this issue arose, coupled with a close reading of the district court and Ninth Circuit orders, makes clear that neither court addressed or "implicitly" decided this issue.

As discussed previously, when the Ninth Circuit reversed that district court's dismissal based on violation of the sealing provision, it directed the district court to consider whether Lujan's action was barred based on lack of subject mater jurisdiction under section 3730(e)(4) because the allegations in Lujan's complaint were similar to those publicly disclosed in the Schumer action. In the district court's "Order Re Briefing of Issues Upon Remand," the parties were directed to brief this specific issue. The district court granted dismissal based on lack of subject matter jurisdiction pursuant to § 3730(e)(4). Regardless of whether Hughes attempted to argue that the case should have been dismissed based on lack of subject matter jurisdiction under § 3730(b)(5) as well, it is clear that the district court based its decision solely on § 3730(e)(4) and did not mention or discuss § 3730(b)(5).

When the dismissal was appealed to the Ninth Circuit, subject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Plaintiff argues that the Ninth Circuit's very silence implies that it rejected the defendant's argument. However, it is much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination. Therefore, this court does not find Lujan's contention that the Ninth Circuit implicitly rejected Hughes § 3730(b)(5) persuasive.

C. Section 3730(b)(5) Applies To This Action Because Schumer's Action Was Pending At The Time Lujan Filed Her Case

Plaintiff argues that § 3730(b)(5) applies only when another action is "pending" and that because Schumer's action was dismissed in 1997, there is no action pending which would bar Lujan's action. This argument is disingenuous.

Schumer's action was pending at the time that Lujan filed her claim. Therefore, under the plain meaning of the statute, Lujan's action is barred if the Court determines that it is related to the Schumer action because Lujan brought this lawsuit while the Schumer action was pending. Plaintiff's suggested interpretation of § 3730(b)(5) would strip the provision of meaning since both the case

law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a "first to file" rule which would prevent multiple separate suits based on the same claims. *See e.g., United States ex rel Erickson v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989). To allow subsequent qui tam lawsuits to be filed as long as the previously-filed qui tam actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5). Thus, the Court rejects this argument.

D. Lujan's Claims Are Related To Schumer's Claims

1. Standard For Determining Related Claims Under Section 3730(b)(5)

Section 3730(b)(5) has been interpreted as a "first to file" rule which sets a jurisdictional bar to any related *qui tam* action. *See United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 918-19 (E.D. Va. 1989). One of the purposes of the 1986 amendments, which altered the jurisdictional barriers to bringing a qui tam lawsuit, was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. The amendments were also an attempt "to clarify in the statute that private enforcement under the civil False claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6290; *see also United States ex rel.*

Taxpayers Against Fraud and Walsh v. General Electric Company, 41 F.3d 1032, 1035 (6th Cir. 1994).

While courts have been anything but uniform in interpreting what constitutes a related case under section 3730(b)(5), most courts have rejected an identical facts test. *See United States ex rel. Capella v. United Technologies Corp.*, 1999 WL 464546 at *8 (D. Conn. June 3, 1999) (analyzing tests applied by other courts). The Third Circuit's test focuses on whether the "later filed allegation states all the essential facts of a previously-filed claim." *United States ex rel. LaCorte v. Smithkline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 232-33 (3d Cir. 1998). If the claim is based on the same essential facts or circumstances, it is barred regardless of the fact that the allegations "incorporate[ ] somewhat different details." *Id.* Similarly, Judge Kenyon, of the Central District of California, concluded that § 3730(b)(5) bars claims to the extent that they raise "issues which were the subject of the [prior action]." *Hyatt v. Northrup Corp.*, 1989 U.S. Dist. LEXIS 18941, AT *2. The Eleventh Circuit has also indicated, although in dicta, that qui tam cases based on "the same type of conduct would be barred." *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florada* [sic], *Inc.*, 19 F.3d 562, 567 (11th Cir. 1994). In *United States ex rel. Erickson*, a lower court in Virginia adopted a somewhat different two-part test under § 3730(b)(5): "A subsequently filed qui tam suit may continue only to the extend [sic] that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to a separate and distinct recovery by the government." 716 F. Supp. at 918. While all of these cases apply a somewhat different standard in determining whether a subsequently

filed qui tam case is barred under § 3730(b)(5), "they contain one common principle – section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action even if the allegations cover a different time period or location within a company." *United States ex rel. Capella v. United Technologies Corp.*, 1999 WL 464536, *9 (D. Conn. June 3, 1999).[1]

The First Circuit has adopted quite a different approach: "We think a court should look first to whether the two cases can properly be seen as having a host-parasite relationship. In answering the question, we think it would be useful . . . [to] ask whether the qui tam case is receiving 'support, advantage, or the like' from the host case. . . . " *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 327 (1st Cir. 1994) (internal citations omitted). The First circuit's analysis was in connection with § 3730(e)(3) which bars a qui tam suit based upon transactions or allegations which are the subject of another suit in which the government is a party. However, the same analysis could clearly apply under § 3730(b)(5) and, in fact, one district court has held that this host-parasite analysis may be useful in analyzing

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[1] Lujan argues that section 3730(b)(5) only precludes a subsequently filed qui tam suit based on identical facts. Plaintiff relies solely on *United States ex rel. Dorsey v. Warren E. Smith Community health/Mental Retardation & Substance Abuse Centers*, C.A. No. 95-7446, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) for this proposition. *Dorsey* appears to be the only court to have adopted such a stringent standard and it seems that *Dorsey* is no longer good law since more recent Third Circuit opinion in *LaCorte* appears to overrule it.

§ 3730(b)(5) cases. *See Capella*, 1993 WL 464536, *8-9. The First Circuit indicated that where a host-parasite relationship was found, an identity between the later filed qui tam action (the "parasite") and the earlier case (the "host") could be presumed, while the lack of a host-parasite relationship would indicate there was no identity between the two cases. *Id.* at 328.

While the Court agrees that the existence of a host-parasite type relationship might generally be indicative of whether the later filed qui tam action is "related to" or based upon the same facts as the previously filed case, the court does not find this test particularly helpful. Under this test, two or even ten relators who had independent knowledge of a scheme to submit false claims to the government could all file suit based on identical facts. None of the relators would be receiving support or advantage from any of the other relators because of their independent knowledge. Therefore, no host-parasite relationship would exist and, under the First Circuit's test, all cases could logically go forward. However, § 3730(b)(5), unlike the public disclosure jurisdictional bar found in § 3730(e)(4), contains no exception for relator's who are deemed to be an "original source" of the allegations. Therefore, the hypothetical identical suits should clearly be barred from going forward under a plain reading of the § 3730(b)(5)

The Court finds the Third Circuit's test and reasoning set forth in the *LaCorte* decision more persuasive. The Court agrees that,

> [A]s a matter of fairness claimants alleging the same material facts as prior relators should not

> share in a qui tam award, because their allegations are unlikely to increase the total recovery. In addition, such duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.

149 F.3d at 234.

Therefore, the Court will apply the test adopted by the Third Circuit in *LaCorte* to determine whether Lujan is barred by § 3730(b)(5) from bringing the present qui tam action. Thus, if Lujan's claims are based on the same essential facts as Schumer's claims, § 3730(b)(5) bars Lujan's case regardless of whether the two claims incorporate somewhat different details.

2. Lujan's And Schumer's allegations Are Based On The Same Essential Facts

Judge Ideman determined that Lujan's allegations were "substantially similar" and thus, were "based upon" those publicly disclosed in Schumer's lawsuit. *See* Minute Order Dismissing Relator Lujan's Qui Tam Counts (Mar. 19, 1996). Lujan attempted to distinguish her allegations as involving mischarging within the B-2 program while Schumer's allegations involved cost shifting among the B-2 program and other aircrafts. However, upon reviewing both sets of allegations, the district court previously found that "Lujan's allegations are simply a variation on Schumer's." The court went on to conclude that "[t]o give credence to Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims

Act." *Id.* at 6 (internal citation omitted). In reviewing the district court's determination, the Ninth Circuit affirmed the finding that the:

> Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar systems programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts. In sum, we agree with the district court that Lujan's allegations are substantially similar to those disclosed in the earlier Schumer action.

Lujan, 162 F.3d at 1033.

The Court concludes that Lujan's lawsuit is based upon the same essential facts and raises the same issues as Schumer's previously-filed action. Therefore, Lujan's action is barred by § 3730(b)(5).

E. Lujan's Contention that Schumer's Claims Should Not Be Considered Because They Were Not Decided on the Merits is Incorrect

The Court need not decide whether Lujan's claim would be barred even if Schumer's claims were not decided on the merits because it is clear, given the procedural history of the Schumer action, that the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct, conduct that is no longer at issue in Lujan's case after the Ninth Circuit's recent decision. Lujan's remaining claims parallel Schumer's post-1996 claims which were decided against Schumer on the merits by Judge Pfaelzer in 1992 and affirmed by the

Ninth Circuit in 1995. Therefore, Lujan's argument is without merit.

III. Conclusion

Lujan is barred from bring [sic] this qui tam action by § 3730(b)(5) of the FCA because her action is related to a previously-filed qui tam lawsuit initiated by Schumer.[2] Therefore, Lujan's action is dismissed.

IT IS SO ORDERED.

DATED: 1/20/2000

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

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[2] Because the Court finds that Lujan's action must be dismissed pursuant to § 3730(b)(5), the Court declines to address Hughes' novel arguments that Lujan's action is also barred by res judicata and collateral estoppel.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiff, v. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 92-1282 SVW JUDGMENT (Filed Jan. 20, 2000)

The Court has dismissed Linda A. Lujan's qui tam action because it is barred by § 3730(b)(5) of the False Claims Act. *See* 31 U.S.C. § 3730(b)(5).

The Court hereby enters judgment in favor of defendant Hughes Aircraft Company and against plaintiff Linda A. Lujan. Pursuant to this judgment, plaintiff shall take nothing as against defendant.

IT IS SO ORDERED.

DATED: 1/20/2000

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE